Supreme Court, U.S.
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No. 92-1692

In The

# Supreme Court of the United States

October Term, 1992

City of Ely; Conservationists With Common Sense, Inc.; F.B. Hubachek, Jr.; Wilderness Outfitters, Inc.,

*Petitioners,*

v.

Friends of the Boundary Waters Wilderness; Sierra Club; The Wilderness Society; Defenders of Wildlife; Wilderness Watch; Wilderness Inquiry; Minnesota Public Interest Research Group; Izaak Walton League of America, Inc.,

*Private Respondents,*

and

F. Dale Robertson, Chief of the United States Forest Service; Mike Espy, Secretary of Agriculture,

*Federal Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PRIVATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit correctly held that Section 4(g) of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978), and the Wilderness Act, mandate an end to the use of trucks on certain portages in the Boundary Waters Canoe Area Wilderness if it is physically possible for portage users to reach the lakes served by the portages using nonmotorized means.

## PARTIES

The petitioners (intervenor-defendants below) are the City of Ely, Minnesota, Conservationists with Common Sense, Inc., F.B. Hubachek, Jr., and Wilderness Outfitters, Inc.

The private respondents (plaintiffs below) are Friends of the Boundary Waters Wilderness, Sierra Club, The Wilderness Society, Defenders of Wildlife, Wilderness Watch, Wilderness Inquiry, Minnesota Public Interest Research Group, and Izaak Walton League of America, Inc.

The federal respondents (defendants below) are the Chief of the Forest Service, F. Dale Robertson, and the Secretary of Agriculture, Mike Espy.

The private respondents have no parent corporation or subsidiaries within the meaning of Supreme Court Rule 29.1.

TABLE OF CONTENTS

Page

OPINIONS AND ORDERS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. THE COURT BELOW PROPERLY APPLIED THE *CHEVRON* DOCTRINE TO THE INTERPRETATION OF THE BWCAW ACT ..... 4

II. NO ISSUE CONCERNING THE FIFTH AMENDMENT IS PROPERLY BEFORE THIS COURT ..... 8

CONCLUSION ..... 9

# TABLE OF AUTHORITIES

Page

## Cases

*American Textiles Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490 (1981) ..... 6, 7

*Brock v. Pierce County*, 476 U.S. 253 (1986) ..... 7

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... 3, 4

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) ..... 6, 7

*Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (8th Cir. 1992) ..... *passim*

## Constitution and Statutes

U.S. Const., Amendment V ..... 3, 8

Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92 Stat. 1649 (1978) ..... *passim*

Section 4(d) ..... 5

Section 4(g) ..... *passim*

Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) ..... 7

Tucker Act, 28 U.S.C. § 1491 ..... 8

Wilderness Act, 16 U.S.C. §§ 1131-36 ..... 3

## Federal Regulations

36 C.F.R. § 251.60 ..... 8

36 C.F.R. § 293.16(b)(1) ..... 5

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Respondents Friends of the Boundary Waters Wilderness, Sierra Club, The Wilderness Society, Defenders of

Wildlife, Wilderness Watch, Wilderness Inquiry, Minnesota Public Interest Research Group, and Izaak Walton League of America, Inc. (collectively "the Friends") submit this brief in opposition to petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS AND ORDERS BELOW

The mandate of the court of appeals issued to the district court on February 19, 1993. The Friends moved for summary judgment before the district court. On April 9, 1993, the district court granted the Friends' motion in relevant part, and entered an order ending forthwith motorized use on the Prairie, Trout Lake, and Four Mile Portages. A copy of that order is reproduced in the appendix to this brief.

## JURISDICTION

The Friends do not contest the jurisdictional statement in the petition by City of Ely, *et al.*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the Boundary Waters Canoe Area Wilderness Act, Pub. L. No. 95-495, 92

Stat. 1649 (1978) ("BWCAW Act"), specifically Section 4(g), and the Wilderness Act, 16 U.S.C. §§ 1131-36.

At no time prior to the filing of City of Ely's petition with this Court has any issue involving the fifth amendment to the United States Constitution been raised or litigated in this action. No such issue is properly before this Court.

## STATEMENT OF THE CASE

The court of appeals opinion accurately and fairly sets forth the history of the litigation and the prior administrative review process. *Friends of the Boundary Waters Wilderness v. Robertson*, 987 F.2d 1484, 1484-86 (8th Cir. 1992), reprinted in petitioners' appendix at 1a-5a.

## SUMMARY OF ARGUMENT

The decision below was a routine instance of a court interpreting a statute. The court of appeals explicitly applied this Court's precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding that Congress in the BWCAW Act had expressly addressed the issue of motorized portages, and had made the determination that if nonmotorized means of portaging were available, trucks should not be used in a designated wilderness.[1] In light of the undisputed factual record that portage wheels – small wheelbarrow-like

[1] While petitioners claim that the Eighth Circuit's decision was "patently contrary to decisions of this Court and . . . other

devices – can be used to transport boats to the lakes served by the portages, the Eighth Circuit simply enforced Congress's will and reversed the district court's judgment refusing to enjoin the use of trucks on the portages.

The government has not sought review of the Eighth Circuit's decision. The portages are now closed to motorized use. In all likelihood, Section 4(g) of the BWCAW Act, regulating three small pieces of land in one northern Minnesota wilderness, will never again require judicial attention.

## ARGUMENT

### I. THE COURT BELOW PROPERLY APPLIED THE *CHEVRON* DOCTRINE TO THE INTERPRETATION OF THE BWCAW ACT

This case presents a routine application of this Court's *Chevron* precedent. The Eighth Circuit examined the statute at issue, determined that Congress had spoken to the question before it, and gave effect to that congressional intent. 978 F.2d at 1486, citing *Chevron*, 467 U.S. at 842-43.

In 1978 when Congress passed the BWCAW Act it specifically addressed the fate of five motorized portages in the wilderness. In a legislative compromise known as

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decisions of the Eighth Circuit," Petition at 3, petitioners identify no relevant case of this Court ignored by the Eighth Circuit, and identify no contrary Eighth Circuit precedent, as there is none.

the Dayton-Walls compromise, Congress in Section 4(d) of the Act permitted two portages (Beatty and Loon Falls Portages) to remain open to motorized use indefinitely, and in Section 4(g) ordered the Secretary of Agriculture to close the other three (those at issue here) in 1984, if it was "feasible" to use nonmotorized means to reach the lakes served by the trucks:

> Nothing in this Act shall be deemed to require the termination of the existing operation of motor vehicles to assist in the transport of boats across the [Prairie Portage, Four Mile Portage, and Trout Lake Portage] during the period ending January 1, 1984. *Following said date, unless the Secretary determines that there is no feasible nonmotorized means of transporting boats across the portages to reach the lakes previously served by the portages listed above, he shall terminate all such motorized use of each portage listed above.*

(Emphasis added.)

The administrative appeal process prior to this litigation established the one undisputed fact relevant to the case: that it is physically possible for fishermen to use nonmotorized portage wheels to haul their boats and gear to the lakes served by the portages.[2] The legal issue

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[2] Indeed, there has always been a quality of absurdity to any contention that portage wheels were not a feasible means of reaching the lakes served by the truck portages. For over 25 years the Forest Service has, by published regulation, authorized portage wheel use on the portages at issue. *See* 36 C.F.R. § 293.16(b)(1). The record below contains evidence of portage wheel use on the portages going back at least to the early 1960s. It is difficult to contend that the Forest Service would expressly

then became whether the ability to use portage wheels made it "feasible" to reach the lakes served by the truck portages, mandating an end to motorized use.

The Eighth Circuit looked to two decisions of this Court to determine that when Congress orders an agency to make a feasibility determination, the agency is given little discretion and is simply to determine whether a task is physically capable of being done. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971), this Court held:

> [T]he requirement that there be no "feasible" alternative route admits of little administrative discretion. For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.

In *American Textiles Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-509 (1981), this Court held:

> The plain meaning of the word "feasible" supports respondents' interpretation of the statute. According to Webster's Third New International Dictionary of the English Language 831 (1976),

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draft, pass and maintain for 25 years regulations authorizing a nonfeasible form of transportation across the three portages.

The petitioners also greatly exaggerate the physical effort required to use portage wheels. One of the men the Friends had demonstrate portage wheel use was 66 years old at the time. A Forest Service test party composed entirely of senior citizens successfully crossed the portages using portage wheels. The record below shows that in all the years portage wheels have been used on the three portages, no injury has ever been reported.

> "feasible" means "capable of being done, executed, or effected." Accord, the Oxford English Dictionary 116 (1933) ("Capable of being done, accomplished or carried out"); Funk & Wagnalls New "Standard" Dictionary of the English Language 903 (1957) ("That may be done, performed or effected"). Thus, § 6(b)(5) [of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5)] directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done. . . . "

While the court of appeals found the plain language of the statute dispositive in light of the *Overton Park* and *American Textiles* cases, the court's opinion does note that the legislative history of the Dayton-Walls compromise fully supports the interpretation of "feasible" as meaning simply "capable of being done." 978 F.2d at 1488. The Eighth Circuit's method of analyzing the BWCAW Act's legislative history, including the statements made by Representative Burton to his colleagues in his capacity as manager of the House Conference Committee, was fully consistent with precedent of this Court. *See, e.g., Brock v. Pierce County,* 476 U.S. 253 (1986).

In light of the congressional mandate that motorized use end if feasible nonmotorized means of access exist, the factual evidence that nonmotorized portage wheels are capable of being used on the portages at issue, and this Court's precedents, the Eighth Circuit took the only available course. It enforced the statute and reversed the district court's order refusing to enjoin continued motorized use on the portages. While that result was

displeasing to the petitioners, it was legally routine, and certainly not in conflict with any of this Court's decisions or any other lower federal court decisions.

## II. NO ISSUE CONCERNING THE FIFTH AMENDMENT IS PROPERLY BEFORE THIS COURT

The claim that enforcing Section 4(g) of the BWCAW Act and terminating motorized use at Prairie, Trout Lake, and Four Mile Portages violates the fifth amendment has never previously been raised or preserved on appeal. This Court should not address it at this late date.

The argument is clearly meritless anyway. The portages themselves are all public land, part of the Superior National Forest. The truck concessions are operated under special use permits granted by the Forest Service. The Forest Service may terminate those special use permits. 36 C.F.R. § 251.60. There is also no reasonable basis on which to claim that Congress cannot direct an end to motorized activities in a wilderness previously authorized by special use permits. In any event, the remedy for a taking claim would be an action for compensation under the Tucker Act, 28 U.S.C. § 1491, not a voiding of Section 4(g) of the BWCAW Act.

## CONCLUSION

For all of the reasons stated above, this Court should deny the Secretary's petition for a writ of certiorari.

May 1993

Respectfully submitted,

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# APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-90-8

| | | |
|---|---|---|
| Friends of the Boundary Waters Wilderness, *et al.* | ) | ORDER |
| v. | ) | (Filed 4-9-93) |
| F. Dale Robertson as Chief of the United States Forest Service, *et al.* | ) | |

This matter is before the Court on plaintiffs' motion for summary judgment. This Court's decision, reported at 770 F.Supp. 1385, has been reversed on appeal. *See Friends of the Boundary Waters v. Robertson,* 978 F.2d 1484 (8th Cir. 1992), *reh'g and reh'g en banc denied* (1993). The mandate of the Court of Appeals was issued on February 19, 1993. On April 1, 1993, that Court denied a motion to recall the mandate, or for a stay.

Therefore, the plaintiffs' motion is granted in part, and denied in part. The Court will direct the Secretary of Agriculture to close the motorized portages, and remand this matter for further proceedings consistent with the now properly understood applicable law. *See e.g., N.L.R.B. v. Enterprise Ass'n of Pipefitters,* 429 U.S. 507, 523 n. 9 (1977); *County v. Dole,* 886 F.2d 147, 149 (8th Cir. 1989); *Pollgreen v. Morris,* 770 F.2d 1536, 1544-45 (11th Cir. 1985).

Based upon the files, records, and proceedings herein, and pursuant to 5 U.S.C. § 706, IT IS ORDERED that:

1. The Secretary of Agriculture shall, forthwith, terminate the operation of motorized portages from Sucker Lake to Basswood Lake (Prairie Portage), from Fall Lake to Basswood Lake (Four Mile Portage) and from Lake Vermillion to Trout Lake (Trout Lake Portage).

2. The matter is remanded to the Secretary of Agriculture who is directed to take those actions necessary to comply with the dictates of the Wilderness Act of 1964, as amended, 16 U.S.C. §1131, *et seq.*, the Boundary Waters Canoe Area Wilderness Act of 1978, P.L. 95-495, 92 stat. 1649, the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and the National Forest Management Act, 16 U.S.C. § 1600.

3. Plaintiffs may submit a petition for costs, including attorneys' fees, within 30 days, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The defendants may be permitted to respond to the fee petition within 10 days thereafter. Any petition and response which are filed shall be directed to the United States Magistrate of this Court for report and recommendation, pursuant to 28 U.S.C. §636(b)(1)(B).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: April 9, 1993

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge